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In the

Supreme Court of the United States

October Term, 1931

No. [redacted] 15

Interstate Commerce Commission
Petitioner

v.

The New York, New Haven and Hartford Railroad Company, Old Colony Railroad Company, Boston and Providence Railroad Corporation (Massachusetts), Boston and Providence Railroad Corporation (Rhode Island), Providence, Warren and Bristol Railroad Company, Harlem River and Port Chester Railroad Company, Holyoke and Westfield Railroad Company, Providence and Worcester Railroad Company, Chatham Railroad Company, and Norwich and Worcester Railroad Company
Respondents

Respondents' Petition for Rehearing

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In the

Supreme Court of the United States

OCTOBER TERM, 1931

No. 773

INTERSTATE COMMERCE COMMISSION

PETITIONER

v.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY ET AL.

RESPONDENTS

RESPONDENTS' PETITION FOR REHEARING

This case was brought before this Court upon a writ of certiorari to the Court of Appeals of the District of Columbia, which had reversed a judgment of the Supreme Court of the District of Columbia denying a petition for mandamus to compel the Interstate Commerce Commission, hereinafter referred to as the Commission, to correct its final valuation under Section 19a of the Interstate Commerce Act of the properties of The New York, New Haven & Hartford Railroad Company and its controlled or leased lines, hereinafter referred to as the Carrier, by ascertaining and reporting the value of the Carrier's rights in certain tracks from Woodlawn to Forty-third Street and in the Grand Central Terminal in New York City and in the South Station in Boston. The judgment of the Court of Appeals was reversed and that of the Supreme Court affirmed by a judgment of this Court entered on November 21, 1932. The Chief Justice and Mr. Justice Butler took no part in the consideration and decision of this case and Mr. Justice Van Devanter, Mr. Justice McReynolds and Mr. Justice Suther-

land were unable to concur in the decision. The decision, therefore, was rendered by a minority of the full Court, Mr. Justice Cardozo delivering the opinion.

The decision was put distinctly on the ground that the remedy by mandamus was not available and the question whether the Carrier's interests in the tracks and terminals should have been given a specific valuation was expressly not determined, as stated in the concluding paragraph of the opinion:

> "Mr. Justice Van Devanter, Mr. Justice McReynolds and Mr. Justice Sutherland are unable to concur in this decision. But, as the decision is put distinctly on the ground that the specific duty sought to be enforced by mandamus is not so definitely and plainly described by the statute as to justify the application of that remedy, and the question whether the inventory in controversy, omitting a specific valuation of important rights and interests, gives full or adequate effect to the intent of the statute, is not determined but distinctly reserved for future contestations, they deem it sufficient to say at this time that they regard the reasons assigned by the Court of Appeals for its judgment as sound and requiring an affirmance of its judgment."

Nevertheless in the course of the opinion the Court reviewed at great length the method of valuation adopted by the Commission in language which can hardly fail to affect the consideration of that question adversely to the Carrier's position in future contestations before the Commission and other courts. In full and sincere recognition of the learned and exhaustive consideration given the case, manifest upon the face of the opinion, the possibility of a modification of this notably close decision upon rehearing is respectfully offered as a justification for this petition.

The Carrier petitions the Court for a rehearing under Rule 33 for the reasons hereinafter set forth:

1. In discussing obiter *the method of valuation adopted by the Commission, the Court has expressed views prejudicial to the Carrier upon an important question of valuation which was not in issue in this case.*

The Commission in its report on the final valuation had said of the tracks from Woodlawn to Forty-third Street (Record, p. 64):

> "In our finding of value of the property owned or used in common carrier service for rate-making purposes, we are of the opinion that no specific sum should be found for the carrier's right to use these tracks. It is therefore not necessary for us to determine whether the right of use in the carrier is best defined by reference to it as a license to use, an easement or a trackage right. We do recognize that the advantages to the carrier of these rights are valuable and essential to the operation of its property as a whole. Nevertheless, for the purpose of finding a rate base, it is distinguished only by its magnitude from the many other similar rights of carriers to the joint use of property wholly owned by other carriers"—

and of the Grand Central Terminal (Record, p. 66):

> "The right to use these extensive terminal facilities is a commercially valuable contract right owned by the carrier, and this joint use thereof is also a valuable asset to the owning company. But for the purpose of ascertaining the value, for rate-making purposes, of the carrier's property owned or used in common carrier service, no specific value will be reported for the right of the carrier to the use of this property."

Those summary extracts from the report make it plain that this Court had before them two, and only two, questions: (1) Whether the Commission was required to report a specific value for these admittedly valuable rights; and (2)

Was mandamus the proper remedy? Having reached the conclusion that mandamus was not the proper remedy, the Court was not called upon to discuss the question whether these rights, constituting, as the Carrier contended, an interest or estate in the physical property itself, were entitled to a specific valuation. The Court, nevertheless, in a decision rendered by a minority of the justices, expressed their views *obiter* not only upon one of the questions before them, but also upon a most important question which was not before them at all. They did not confine themselves to the question whether the Commission was required to report a specific value for the Carrier's rights in the tracks and terminals, but dealt with the further question of how that value should be ascertained, and in so doing went beyond any issue in this case.

In the opinion the Court speaks constantly and with approval of the "method of appraisal" adopted by the Commission and purport to reject the method which the Carrier presented to the Commission for ascertaining the value of its rights in the tracks and terminals:

> "Plainly untenable is its contention that the amount to be allowed to it is the proportion of the cost value of the property that would result from a division of such value between itself and the Central in the ratio of use" (Opinion, p. 9).

The Court then proceeded with an elaborate analysis of the proper method of valuing leaseholds and similar interests. They plainly indicate their own view that the Carrier is not entitled to have any part of the physical property valued to it for the reason that it "has not invested anything in the roadbed or the terminals" and "is not affected for good or ill by fluctuations in the cost of building them anew." They say that, because the Carrier pays substantial rentals for its perpetual easement and lease, its claim for a proportion of the value of the physical property itself "treats

as an investment what is merely a contingent debt." They state categorically that "the value for the New Haven is not the value of the thing or piece of property owned or used, or of any fractional interest therein," but only "the value of the use," and even go into the evidence of value which the Carrier laid before the Commission, saying:

> "It took its stand upon the position that *pro tanto,* in proportion to its use, it was the owner of the fee."

The Carrier claims that its perpetual easement in the tracks and its perpetual lease of an undivided half of the terminal, equivalent to a base fee, were not mere contract rights of use, but estates in the physical property itself, and that, if the Commission, as the Commission itself claims, is making only a "physical valuation," it cannot disregard this "fractional interest therein" and that question was before the Court. But whether that value should be determined on the theory presented by the Carrier to the Commission, that is to say, a percentage of the total value of the property "in proportion to its use," or whether it should be determined by some other method, such as taking into consideration the rental payments which it has to make, was not a question in this case. The view expressed in the opinion that the New Haven is not entitled to any part of the "cost" of the property, by which presumably the Court meant the reproduction cost or value of the physical property, because it had no investment therein is challenged by the Carrier in that there is no relation whatever between investment and value and as being a recurrence to the prudent investment theory set forth in the dissenting opinion of Mr. Justice Brandeis in *Southwestern Bell Telephone Co.* v. *Public Service Commission,* 262 U.S. 276, 289, which has not hitherto been accepted by this Court. Even if the Commission is authorized to limit its valuation to rate making purposes, which the Carrier does not concede, the public served are concerned only with the value of the property employed

in the service irrespective of what the operating carrier pays for its use.

Now this question of how the value of the Carrier's rights should be ascertained is bound to be raised in future proceedings involving this final valuation, and the expressions of this controlling and distinguished tribunal will necessarily influence the Commission and other courts in reaching their conclusions. As this question was not in issue in this case, was not argued by counsel on either side and only incidentally mentioned in the briefs, the Carrier asks for a rehearing at which it may be adequately presented and considered.

It is possible that in lieu of granting a rehearing the Court might prefer to adopt the alternative suggested by *Donnelly* v. *United States*, 228 U.S. 708, 711, where they recalled certain parts of the opinion relating to an issue which was not presented, although the petition for rehearing was denied on the ground that no useful purpose would be served by further argument. The following remarks by Mr. Justice Pitney seem peculiarly applicable to the present case:

> "The state of the record, therefore, did not entitle the plaintiff in error to call upon this court to decide the merits of the question of the navigability of the river and its effect upon the jurisdiction of the Circuit Court over the homicide. In discussing the merits we assumed (in favor of plaintiff in error) that the question was raised by the record. But since it is now suggested that in so doing we have passed upon a question that was not adequately argued, and which in its consequences involves important interests, other than those of the plaintiff in error, we prefer to and do recall so much of the opinion as holds that . . ."

2. The record contains nothing to support the Court's inference that the value of the Carrier's rights in the tracks and terminals was reflected in the final valuation.

The Court inferred that although the Commission expressly stated that no specific sum should be found for the Carrier's rights in the tracks and terminals, nevertheless their value must be deemed to have been reflected in the final single-sum valuation. In the language of the opinion (Opinion, p. 15):

> "Every trackage contract and every terminal use, in so far as it contributes to the unity of the system, is reflected in the final value ascribed to the physical things that are listed in the inventory"—

in support of which the Court quoted the following generalization from the report:

> "'We have given careful consideration' said the Commission, 'to all facts of record and pertaining to the value of the common carrier property of the Carrier as an organized, developed, well maintained, seasoned property in operation as a going concern'. Many diverse elements, reacting one upon the other, have been fused in an act of judgment drawing its sustenance from all.'"

Some such general conclusion is common in all the valuation reports, and if the Commission's mere statement that it has considered everything the statute requires it to consider is to preclude judicial inquiry into the question, the carriers must submit without remedy to its economic theories. Such comprehensive effect was not accorded to the generalizations of the Commission in *St. Louis & O'Fallon Railway Co.* v. *United States*, 279 U.S. 461, where the Court found that the Commission had not given due consideration

to reproduction cost in spite of the following statement in its report:

> "The statute directs that in determining values pursuant to Section 15a we shall 'give due consideration to all the elements of value recognized by the law of the land for rate-making purposes'. In the method of valuation which we have followed in this proceeding we have endeavored to give heed to this direction. . . ."

In his dissenting opinion in that case Mr. Justice Brandeis relied upon that and similar statements in the report, saying, at p. 543:

> "It states that 'it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the carrier' as well as the evidence otherwise introduced; and that 'from this accumulation of information we have formed our judgments as to the fair basic single-sum values, not by the use of any formula but after consideration of all relevant facts' "—

but his view did not prevail.

The Court in the present case indicates that the Carrier's rights in the tracks and terminals may have been considered broadly under going-concern value. Apart from the Commission's general statement referred to above, it does not appear in the report that they were so considered. The Court say (Opinion, p. 8):

> "At one point or another a line of division has to be drawn between the property to go in and the property to stay out."

The Carrier, in brief and argument, did not, as the opinion would indicate, draw the line at any particular point or concede that even a license might not be entitled to separate

valuation, but having, as it claimed, estates in the physical property itself, it contended that those estates certainly were "property to go in," whatever might be true of licenses, contracts and lesser rights. The Commission found they were "property to stay out" and made no claim that their value had been ascertained and reported.

The Court lay great stress upon the fact that during nineteen years the Commission has steadfastly adhered to this method of valuing jointly used property (Opinion, p. 6) and that in only one instance has it been "challenged in the Courts." The procedural difficulties resulting from the decision in *United States* v. *Los Angeles & Salt Lake Railroad Co.*, 273 U.S. 299, have discouraged the carriers from challenging this method of valuation in the courts, but it seems only fair to say that they have frequently challenged, and never acquiesced in, this method in proceedings before the Commission. An administrative practice of the Commission inconsistent with the law of the land should obtain no sanction by virtue of its antiquity.

As counsel we certify that this petition is presented in good faith, and not for delay.

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